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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RONALD RALPH DEMEDIO, Defendant and Appellant.	E063425 (Super.Ct.No. SWF1203227) OPINION

APPEAL from the Superior Court of Riverside County. Angel M. Bermudez, Judge. Affirmed in part, vacated in part, and remanded with directions.

Renee Rich, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Joy Utomi, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Ronald Ralph Demedio guilty of first degree residential burglary (Pen. Code, § 459; count 1)[1]; receiving stolen property (§ 496, subd. (a); count 2); and grand theft of a firearm (§ 487, subd. (d)(2); count 3). Defendant thereafter admitted that he had suffered five prior prison terms (§ 667.5, subd. (b)), three prior serious felony convictions (§ 667, subd. (a)), and three prior strike convictions (§§ 667, subds. (c), (e)(2), 1170.12, subd. (c)(2)(A)). As a result, defendant was sentenced to a total indeterminate term of 25 years to life and a total determinate term of 13 years in state prison. On appeal, defendant argues that his sentence of 25 years to life on count 2 is unauthorized and that the trial court erred in staying, rather than striking, two of his prior prison term enhancements. For the reasons explained below, we will vacate the sentence and remand the matter for a new sentencing hearing.

I

FACTUAL BACKGROUND

In August 2012, the Bessey family resided in a motel in Hemet, California. On August 21, 2012, Mrs. Bessey left for work around 8:30 a.m. or 8:45 a.m., and was the last person to leave their room, No. 120. Before she left, she closed the window to their room, locked the door to the adjoining room, and shut the outside door. When Mrs. Bessey returned home from work around 4:00 or 4:30 p.m., she found the room in disarray and noticed some of their property was missing. She then left and returned to the room with her husband. Upon examination, they discovered that many of their items

[1] All future statutory references are to the Penal Code unless otherwise stated.

were missing, including a briefcase which contained a handgun registered to Mr. Bessey, a pearl necklace, pearl earrings, two men's rings, and important family documents. Also missing were two laptops, a bag containing Mr. Bessey's drawing materials, a digital camera, a flash drive, clothing, and various other items.

The Besseys reported the loss to the motel manager and to the police. Reviewing the motel's surveillance video, the manager saw a man exit room 120 and then enter room 119 carrying an item which looked like a laptop or briefcase. The manager recognized the man in the video to be defendant.

Investigating the incident, Hemet Police Department Officer Derick Spoelstra spoke with the motel manager and reviewed the motel's video surveillance. After reviewing the video, the officer contacted defendant in room 119. The officer asked defendant if he could search the room, and defendant consented. Officer Spoelstra found an empty briefcase under defendant's bed, and defendant had a ring, two crosses, and a necklace with a cross in his pocket. Mrs. Bessey identified the items as some of the items that were taken from her room. Defendant initially denied being in the Bessey's room, but later admitted he took the briefcase from room 120 and dumped the paperwork from the briefcase into a nearby dumpster.[2]

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[2] At trial, the defense presented numerous pieces of evidence pertaining to defendant's history of mental health and treatment with antipsychotic medications. During the proceedings, a doubt was declared as to defendant's mental competency and criminal proceedings were suspended pursuant to section 1368. Defendant was found mentally incompetent to stand trial and committed to Patton State Hospital for treatment. However, on February 28, 2014, the court found defendant's mental competency had

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II

DISCUSSION

A. *Sentence on Count 2*

Following a jury trial, defendant was convicted of first degree residential burglary (§ 459; count 1); receiving stolen property (§ 496, subd. (a); count 2); and grand theft of a firearm (§ 487, subd. (d)(2); count 3). Defendant thereafter admitted that he had suffered five prior prison terms (§ 667.5, subd. (b)), three prior serious felony convictions (§ 667, subd. (a)), and three prior strike convictions (§§ 667, subds. (c), (e)(2), 1170.12, subd. (c)(2)(A)). The trial court sentenced defendant to a total indeterminate term of 25 years to life and a total determinate term of 13 years in state prison as follows: an indeterminate term of 25 years to life on count 1; a stayed indeterminate term of 25 years to life on count 3; a determinate term of one year for three of the five prior prison terms; and a determinate term of five years for two of the three prior serious felony convictions.[3] As to count 2, the trial court stated: "I have been directed by counsel to consider [section] 654. I think [section] 496 on a case where there was also a theft is a dual conviction issue. So sentence is not imposed on that count. The Court cites that it would be a dual conviction." The court's minute order of the April 24, 2015 sentencing hearing

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been restored and criminal proceedings resumed. The jury implicitly rejected defendant's mental health defense by finding defendant guilty on all three counts.

[3] The trial court stayed sentence on two of the five prior prison terms and the People dismissed one of the three prior serious felony convictions pursuant to section 1385.{2RT 301-302}

and the abstract of judgment, however, reflect that an indeterminate term of 25 years to life was imposed on count 2 and stayed pursuant to section 654.

Defendant argues that the court's minute order of the sentencing hearing and the abstract of judgment must be corrected to reflect the trial court's oral pronouncement not to impose a sentence on count 2. He further contends that the trial court's decision not to impose a sentence on count 2 was proper because a defendant cannot be convicted of and sentenced for both theft and receiving stolen property. Defendant also asserts that even if his count 2 conviction for receiving stolen property is not stricken, he is entitled to a second strike sentence on that count pursuant to Proposition 36, known as the Three Strikes Reform Act of 2012 (the Reform Act).

In 1992, the Legislature codified the common law rule that a defendant may not be convicted of stealing and receiving the same property. (§ 496, subd. (a); *People v. Garza* (2005) 35 Cal.4th 866, 871; *People v. Allen* (1999) 21 Cal.4th 846, 857; *People v. Ceja* (2010) 49 Cal.4th 1, 4 (*Ceja*).) However, this principle is inapplicable where, as here, an individual is convicted of theft and receipt of separate pieces of property. (*Ceja*, *supra*, at pp. 4-5 ["The rule against dual convictions was . . . founded on the notion that it is 'logically impossible for a thief who has stolen an item of property to buy or receive that property from himself.' "].) As to the receiving stolen property conviction, the evidence here showed that defendant was found in possession of the victims' briefcase, a ring, two crosses, and a necklace with a cross. Therefore, regardless of whether defendant actually stole the various items from the Bessey's room, he may be charged with and convicted of

receiving that stolen property independently of any charges or convictions relating to theft of the firearm. (§ 496, subd. (a); see *Ceja*, at p. 7 ["[T]he prosecutor has the discretion to decide which offenses to charge. The courts do not generally supervise these 'purely prosecutorial function[s].' "].) Accordingly, defendant was properly convicted of receiving stolen property as alleged in count 2 and theft of a firearm as alleged in count 3, and the trial court was required to impose sentence on count 2.

Defendant's arguments misconstrue the meaning of *Ceja*. The *Ceja* court did not hold that an accused may not be charged with receiving stolen property as to certain property, if the evidence shows that the accused was the actual thief. Rather, the common law rule, now embodied in section 496, subdivision (a), precludes *dual conviction* of both theft and receiving stolen property as to the same property. (*Ceja*, *supra*, 49 Cal.4th at pp. 6-7.)

In his reply brief, defendant asserts the People forfeited their claim that the trial court erred in finding his conviction for receiving stolen property is an improper dual conviction because the People failed to object in the court below at the time of the sentencing hearing. Defendant also argues that the judgment of the lower court is presumed correct and the People failed to show affirmative error in the trial court's decision to find count 2 to be an improper dual conviction. We reject these contentions.

The forfeiture doctrine generally "applies in the context of sentencing as in other areas of criminal law." (*In re Sheena K.* (2007) 40 Cal.4th 875, 881.) For instance, in *People v. Scott* (1994) 9 Cal.4th 331, 352, the high court held that a defendant cannot

complain for the first time on appeal about the trial court's failure to state reasons for a sentencing choice, reasoning, inter alia, that "[r]outine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention." (*Id.* at p. 353; see *People v. Tillman* (2000) 22 Cal.4th 300, 302-303 [People forfeited its unpreserved challenge to court's failure to state reasons for not imposing restitution fine, a decision constituting discretionary sentencing choice].)

However, as it applies to sentencing error claims, there is a narrow exception to the forfeiture doctrine recognized by the high court for sentences that are not authorized under the law. As the Supreme Court explained in *People v. Smith* (2001) 24 Cal.4th 849, "We have . . . created a narrow exception to the waiver rule for ' "unauthorized sentences" or sentences entered in "excess of jurisdiction." ' [Citation.] Because these sentences 'could not lawfully be imposed under any circumstance in the particular case' [citation], they are reviewable 'regardless of whether an objection or argument was raised in the trial and/or reviewing court.' [Citation.] We deemed appellate intervention appropriate in these cases because the errors presented 'pure questions of law' [citation], and were ' "clear and correctable" independent of any factual issues presented by the record at sentencing.' [Citation.] In other words, obvious legal errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings are not waivable." (*Id.* at p. 852.)

In the present matter, the trial court's finding that defendant's conviction for receiving stolen property as alleged in count 2 was a dual conviction was legally

erroneous because defendant's convictions for theft and receipt are based on separate property. Therefore, the trial court was required to impose a sentence on count 2 and its failure to do so was unauthorized. (*People v. Bradley* (1998) 64 Cal.App.4th 386, 391 [failure to impose a mandated sentence is legally unauthorized and subject to correction for the first time on appeal].)

Defendant further claims, even if his conviction on count 2 is proper, he is entitled to a second strike double determinate sentence on that count pursuant to the Reform Act because receiving stolen property is neither a serious nor violent felony offense. The People agree that defendant should receive a second strike sentence on count 2. We also agree.

On November 6, 2012, California voters approved Proposition 36, which amended the "Three Strikes" law. (*People v. Johnson* (2015) 61 Cal.4th 674, 679 (*Johnson*).) The Reform Act amended sections 667 and 1170.12 so that an indeterminate term of 25 years to life in prison is applied only where a third strike offense is a serious or a violent felony, or where the prosecution pleads and proves an enumerated disqualifying factor. (§§ 667, subd. (e)(2)(A), (C), 1170.12, subd. (c)(2)(C); *Johnson*, *supra*, 61 Cal.4th at pp. 689-690.) If a defendant does not meet any of the enumerated disqualifying factors, the defendant shall be sentenced to a double determinate term. (§ 667, subd. (e)(1).)

In addition, the Reform Act added section 1170.126 to permit the recall of certain sentences imposed under the Three Strikes law. (*Johnson*, *supra*, 61 Cal.4th at pp. 679-

680.) Section 1170.126, subdivision (e)(1)-(3) sets forth an inmate's eligibility for resentencing and establishes several criteria that must be met.

The California Supreme Court held in *Johnson* that an inmate is eligible for resentencing under section 1170.126 on a current conviction that is neither serious nor violent, even though the inmate has another current conviction that is serious or violent. (*Johnson*, *supra*, 61 Cal.4th at pp. 679-680.) The *Johnson* court explained an inmate's eligibility for resentencing under the Reform Act must be evaluated on a count-by-count basis. (*Johnson*, at p. 688.) The *Johnson* court reasoned evaluating resentencing eligibility on a count-by-count basis promotes punishment that fits the crime, effectuates the voters' intent of making room in prison for dangerous criminals while protecting public safety, and prevents a distinction in punishment based on whether counts were tried in the same prosecution. (*Id*. at p. 694.) As a result, the court concluded the Reform Act "requires an inmate's eligibility for resentencing to be evaluated on a count-by-count basis. So interpreted, an inmate may obtain resentencing with respect to a Three Strikes sentence imposed for a felony that is neither serious nor violent, despite the fact that the inmate remains subject to a third strike sentence of 25 years to life." (*Johnson*, at p. 688.)

Here, defendant has two or more prior convictions that qualify as strikes and he committed the instant offenses after the Reform Act went into effect. Defendant's convictions for first degree burglary (§ 459) and grand theft of a firearm (§ 487, subd. (d)(2)) are serious felonies under the Reform Act (§ 1192.7, subd. (c)(18) and (26)). His conviction for receiving stolen property (§ 496) is a nonserious, nonviolent felony,

and none of the disqualifying factors apply here. Under *Johnson*, although defendant was convicted of two serious felonies, these convictions do not make him ineligible as a matter of law to be sentenced on count 2 to a double determinate term. We, therefore, remand for a new sentencing hearing at which the court should impose a double determinate term on count 2.

B. *Sentence on Prior Prison Terms*

Defendant also contends that the trial court erred by staying, rather than striking, two of his five prior prison term enhancements (§ 667.5, subd. (b)). Defendant noted the trial court properly recognized that it could not impose both a one-year prison prior sentence enhancement (§ 667.5, subd. (b)) and a five-year serious felony sentence enhancement (§ 667, subd. (a)(1)) based on the same prior convictions, but that the trial court erred in staying, rather than striking, the prison prior enhancements. The People correctly concede the error. (See *People v. Jones* (1993) 5 Cal.4th 1142, 1153 (*Jones*).)

In *Jones*, the defendant was sentenced to five years for a section 667, subdivision (a) enhancement, and to a one-year section 667.5, subdivision (b) enhancement, based on a prior conviction for a single serious felony and the resulting prior prison term for that felony. (*Jones, supra,* 5 Cal.4th at p. 1145.) The *Jones* court held that a single prior conviction cannot be the basis of both a prior serious felony enhancement and a prior prison term enhancement. (*Id*. at p. 1150.) The court concluded that when multiple statutory enhancement provisions are available for the same prior offense, one of which is a section 667 enhancement, the greatest enhancement—but only

that one—will apply. (*Jones*, at p. 1150.) Because the trial court in *Jones* had used the same offense to impose a five-year term (because the underlying offense was a serious felony) and a one-year term (because the defendant was imprisoned for the prior serious felony), *Jones* held the one-year term should be stricken. (*Jones*, at pp. 1150-1153.)

Likewise, the trial court here imposed both a serious felony prior enhancement under section 667, subdivision (a)(1), and a prison prior enhancement under section 667.5, subdivision (b), based on the same two qualifying convictions, a 1991 residential burglary (second prior prison offense) and a 1996 residential burglary (third prior prison offense). Under *Jones*, the trial court should have struck the one-year second and third prior prison term enhancements.

III

DISPOSITION

The judgment (sentence) is vacated and the matter is remanded for a new sentencing hearing in accordance with this opinion. In all other respects, the judgment is affirmed.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

SLOUGH
J.